come unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors . . .''

6. Rules of Criminal Procedure, Rule 26:

''. . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.''

STATEMENT OF THE CASE.

(A) Facts Relevant to the First Question Presented.

After a trial by jury in the District Court for the Eastern District of Pennsylvania, petitioner was adjudged guilty on counts 2 through 5 and 7 through 9 of an indictment charging him with wilfully attempting to defeat and evade his own income tax and that of four corporations controlled by him.[1] He was sentenced to a total of seven years imprisonment, fined a total of $70,000 and placed on probation for a period of five years to commence upon his release from imprisonment (R. 5a, 1234a, 1235a). At the present time, petitioner is free on bail. (R. 5a; Appendix C).

Counts 2 and 3 of the indictment charged petitioner with wilfully attempting to evade his individual income tax for the years 1955 and 1956, respectively (R. 15a). Count 4 charged him with wilfully attempting to evade the income tax of Pennsylvania Coat and Apron Supply Co. of New Jersey for the period January 1, 1955 to September 1, 1955 (R. 16a), and count 5 charged the same offense with respect to Pennsylvania Laundry Co. for the year 1955 (R. 16a-17a). In count 7, he was accused of wilfully attempting to evade the income tax of Pennsylvania Coat and Apron Supply Co. of Pennsylvania for the year 1956 (R. 17a), and counts 8 and 9 charged him with

1. Petitioner had been jointly indicted with one Rudolph Csicsek. The indictment contained 51 counts. Count 1 charged a conspiracy between petitioner and Csicsek; counts 2 through 27 charged petitioner with the substantive offense of wilfully attempting to evade the income tax; counts 28 through 51 applied only to Csicsek, and since he changed his plea from not guilty to nolo contendere (R. 2a), these counts were not involved in this proceeding. The trial judge granted petitioner's motion for judgment of acquittal on counts 6 and 10 through 27 (R. 3a, 978a), and after the jury's verdict, he granted petitioner's motion in arrest of judgment as to count 1 (R. 1233a).

the same offense with respect to Anderson's Empire Coat, Apron and Towel Supply, Inc. for the years 1955 and 1956, respectively (R. 18a-19a).

Petitioner was the president of thirteen corporations, engaged principally in the laundry and linen supply business (R. 181a-184a); he owned all of the stock of these corporations either directly or indirectly (R. 734a-743a). Included among these corporations are the four mentioned above.

The government's theory was that in the years 1954 through 1956, petitioner withdrew large sums of money from the various corporations controlled by him which were charged against his Loan and Exchange Account on the books of the respective corporations. In the years 1955 and 1956, according to the government, petitioner caused the records of the four companies mentioned above to be rewritten so that the cash sales of these companies would be understated in substantial amounts and he would receive credits to his Loan and Exchange Account in the various companies in amounts equal to the understatements of sales. Again, according to the government, petitioner's tax returns and those of the four companies involved were prepared from the rewritten records with the result that the taxable income of both petitioner and the four companies was understated.

To establish this theory, the government relied principally upon Ciesek, who had been petitioner's administrative assistant and the controller of his various corporations (R. 214a), and upon Daniel Ferrari and Raymond Dombkiewicz, two former employees of those corporations (R. 366a-367a; 414a, 419a). After they had left their employment, the latter two became informers and supplied the government with the information with which it began its investigation of this case. Through these three individuals, the government introduced into evidence certain documents which each of them had taken without permission when they left their employment and which they

had subsequently turned over to representatives of the government. Counsel for petitioner made timely objection to the admissibility of these documents and subsequently moved that they be stricken from the record (R. 238a-239a, 373a, 382a, 430a, 555a-565a, 990a-992a).

Csiesek testified that petitioner had ordered him to rewrite the sales records of Pennsylvania Coat and Apron of New Jersey and of Anderson's Empire so as to understate their cash sales and to make corresponding credits to petitioner's Loan and Exchange Account; he stated that he personally rewrote the records for the first three months and then instructed Ferrari what to do, and the latter carried on from there (R. 214a-219a). When Csiesek left his employment in June, 1958, he took with him certain original records which had been used to record the sales of Pennsylvania Coat and Apron of New Jersey, Pennsylvania Coat and Apron of Pennsylvania and Anderson's Empire and certain checks which had been charged to petitioner's Loan and Exchange Accounts (R. 233a-258a, 273a-277a; Ex. G432-G462, G466-G471). He also took certain other records which he said had been prepared by him for petitioner's use; these records dealt with and analyzed the status of petitioner's Loan and Exchange Accounts and the various credits made thereto (R. 258a-264a; Ex. G463, G464).

Csiesek stated that he had been told by petitioner to destroy these records, but instead of doing so, he retained them in a filing cabinet until he took them with him when he left his employment (R. 236a). He admitted that he had taken the records without authority or permission (R. 237a-238a).

Ferrari testified concerning his part in the rewriting of the records (R. 419a, 421a). He left his employment with petitioner's companies in April, 1958, taking with him original records pertaining to the sales of Pennsylvania Coat and Apron of New Jersey and Anderson's Empire (R. 423a; Ex. G557-G560). Ferrari said that he knew that

the records which he took were not his property and that he had no right to take them from the office to give them to anybody (R. 425a).

Dombkiewicz left his employment with petitioner's companies in August, 1958. When he left, he took records pertaining to petitioner's Loan and Exchange Accounts with Pennsylvania Coat and Apron of New Jersey and Pennsylvania Coat and Apron of Pennsylvania and certain cashier's reports relating to the sales of both of these corporations and of Pennsylvania Laundry (R. 367a-368a, 374a-378a, 382a-384a; Ex. G531-G556). He stated that he took the records for the purpose of turning them over to the Internal Revenue Service; he admitted that he was not the custodian of the records and that he had no permission to take them (R. 369a-370a, 378a).

Csiesek, Dombkiewicz, Ferrari and other witnesses testified extensively concerning these stolen records (R. 213a-282a, 374a-378a, 382a-385a, 415a-423a, 430a-454a, 458a-465a, 493a-496a, 743a-745a, 754a-767a, 784a-800a, 860a-871a).

The trial of this case began on August 18, 1961 (R. 2a); long before that time the government obtained possession of all of the records taken by Csiesek, Dombkiewicz and Ferrari.

Even before they had contacted any revenue agent, Dombkiewicz and Ferrari were aware that informers in tax cases were eligible under the law for a reward based upon the amount recovered from the taxpayer upon whom they informed (R. 372a, 373a, 426a-427a).[2] Dombkiewicz and Ferrari first met with a revenue agent on August 4, 1958; they met again with the agent on August 5, at which time they inquired about the informer's reward, and each of them executed the required application for the reward (R.

2. Section 7623 of the Internal Revenue Code of 1954, 68A Stat. 904, 26 U. S. C. § 7623, authorizes such a reward under regulations prescribed by the Secretary of the Treasury or his delegate. Treas. Regs. § 301.7623-1 sets forth the conditions under which a reward will be paid.

406a). At this second meeting, Ferrari turned over to the agent all of the records which he had taken, and Dombkiewicz delivered some of those which he had taken. Ferrari said that he discussed the nature of the cooperation which would be expected of him if he were to get a reward and was told that this cooperation included the turning over of any records which he might have (R. 429a-430a). Both Dombkiewicz and Ferrari had subsequent meetings with revenue agents, and on December 15, 1958, Dombkiewicz produced the remaining records which he had stolen (R. 410a-442a).

As we have already noted, Csiesek had been indicted along with petitioner and had originally pleaded not guilty. Thereafter, there were discussions between his attorney and the U. S. Attorney concerning the possibility of Csiesek's changing his plea; these discussions were initiated by the U. S. Attorney (R. 500a, 529a). At that time, Csiesek's attorney knew that he had certain records but was not aware of their nature or contents (R. 504a). Csiesek's attorney made it clear that Csiesek would only change his plea and cooperate with the government in the prosecution of petitioner if Csiesek would receive favorable consideration by the government (R. 502a-503a, 530a, 541a-542a). The U. S. Attorney agreed that if Csiesek changed his plea and cooperated fully with the government, he would inform the court that it was the government's position that Csiesek should be given every consideration and should not go to jail (R. 506a, 545a, 548a). The U. S. Attorney indicated what he meant by full cooperation when he told Csiesek's attorney (R. 532a)

> "If your client will plead guilty, and we are to say that he is cooperating, then it must be understood that he makes a full disclosure, that he will make himself available for question and answer, *and any kind of documentary evidence he might have.*" (Emphasis added.)

Later, Csiesek's attorney and the U. S. Attorney conferred in chambers with the judge before whom the change of plea would be made. The U. S. Attorney set forth the substance of his agreement with Csiesek's attorney (R. 506a, 533a). The latter attempted to get some expression of opinion from the judge. The judge referred to another case in which there had been multiple defendants wherein the defendant who changed his plea and cooperated with the government in the prosecution did not receive a jail sentence (R. 506a, 533a-534a).

Following these conferences, Csiesek appeared in court on April 13, 1961 and changed his plea to nolo contendere after having been informed by his attorney that the U. S. Attorney had given assurance that nothing would happen to him and he would not be hurt (R. 324a, 342a). Only then did Csiesek meet with the revenue agents and turn over to them the records which he had taken. This Court may take judicial notice that when Csiesek was sentenced, he was not sent to jail.

(B) Facts Relevant to the Second Question Presented.

The panel of jurors which had been summoned for the trial of this case included a Mrs. Ida B. Robinson, a saleslady who was No. 85 on the jury list, and a Mrs. Lottie P. Robinson, a housewife, who was No. 86 on the list. When the entire panel assembled in the jury room, Mrs. Lottie P. Robinson was not feeling well, and as a result, she was excused by the judge who was then in charge of the criminal trial list. However, no record of this was made at the time and consequently her number was placed in the box from which the jurors were to be drawn for this trial (R. 655a-656a). Neither the trial judge nor any of counsel was aware of what had occurred.

When the jury was being selected for this case, the clerk drew No. 86 from the box and called the name of Mrs. Lottie P. Robinson; Mrs. Ida B. Robinson responded and

took a place among those from whom the regular jury of twelve would ultimately be selected. (R. 30a). After the government and the defense had exercised their respective challenges, Mrs. Ida B. Robinson was one of the twelve remaining. The clerk then assigned those twelve to their proper places in the jury box, and in the course of doing so, he stated ". . . And the next number is Mrs. Lottie Robinson take Seat 10"; Mrs. Ida B. Robinson took the place designated by the clerk (R. 40a). After four alternate jurors had been selected, the jury was sworn, and the trial began.

On the ninth day of the trial, the clerk discovered what had happened and informed the trial judge. The trial judge held a conference in his chambers which was attended by counsel for the government and petitioner and his counsel, and at that time, the foregoing facts were placed on the record (R. 655a-657a).

Counsel for petitioner immediately moved for a mistrial on the grounds that Mrs. Ida B. Robinson had not been called as a member of the jury and was not properly qualified to take the oath and serve as a juror (R. 657a-658a). The trial judge denied this motion, directed that Mrs. Ida B. Robinson be withdrawn from the jury and substituted one of the alternate jurors to serve in her place (R. 659a). Counsel for petitioner excepted to the denial of the motion for a mistrial and excepted also to the substitution of the alternate juror (R. 659a). Thereafter, the trial continued with the alternate juror serving in the place of Mrs. Ida B. Robinson (R. 660a-661a).

REASONS FOR GRANTING THE WRIT.

1. The Admissibility of the Disputed Records Raises Questions of the Continued Vitality and Scope of the Decision in Burdeau v. McDowell Which Should Be Resolved by This Court.

It is no exaggeration to say that the disputed records and the testimony given in connection therewith were the keystone of the government's case against the petitioner. In their absence, there would have been very little to support the government's theory concerning the understatement of corporate sales and nothing to show the amount of the understatement. The records form the principal basis for certain summaries and computations prepared by the revenue agents assigned to this case (R. 723a, 744a, 860a, 866a, 877a, 953a) which the government put into evidence to show the understatement of corporate sales, the credits to petitioner's Loan and Exchange Accounts and the understatement of corporate and individual taxable income (R. 745a-767a, 773a-800a, 861a-878a, 953a-961a; Exs. G620-G623, G631, G632, G637). Without the records, the summaries and computations could not have been prepared.

The District Court and the Court of Appeals agreed that the records had been illegally taken (R. 1218a-1221a; Appendix A). However, both courts concluded that their admissibility had to be sustained because of the decision in *Burdeau v. McDowell*, 256 U. S. 465 (1921).

That case involved a petition seeking the return of certain documents in the possession of a government official, which were about to be presented to the grand jury. The documents had been taken from petitioner's safe by his business associates who later turned them over to the government. A majority of the Court held that the government could retain the documents because there had been no vio-

lation of petitioner's constitutional rights, and the evidence clearly indicated that no government official had been connected with their taking. Although it was not articulated in the opinion, the majority were undoubtedly influenced by that part of the opinion in *Weeks v. United States*, 232 U. S. 383, 398 (1914) in which the Court had announced the rule that evidence unlawfully seized by local police officers acting on their own account could be used in a federal court.

Justice Brandeis, in a dissenting opinion in which Justice Holmes joined, took a broader view of the problem. He concluded that the Court had power to control the disposition of the documents even though the Constitution had not been violated by the government officials and that the documents should be returned to petitioner because (256 U. S. at 477)

> ". . . At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

We believe that the principle set forth in this dissenting opinion has now been accepted by the Court.

In *Nardone v. United States*, 308 U. S. 338 (1939), the Court, in the exercise of its supervisory authority over the administration of justice in the federal courts, concluded that evidence obtained as the result of illegal wiretapping could not be admitted in the federal courts; *McNabb v. United States*, 318 U. S. 332 (1943), decided that a conviction resting on a confession obtained while the accused was unlawfully detained by federal officers should not be allowed to stand because otherwise the courts themselves would be accomplices in the wilful disobedience of law. *Benanti v. United States*, 355 U. S. 96 (1957) held that evi-

dence obtained through wiretapping by state police officers, without participation by federal agents, could not be used in a federal criminal case even though the wiretapping had been authorized by state law.

Finally, there is the decision in *Elkins v. United States*, 364 U. S. 206 (1960). There recordings and a recording machine had been seized by state police officers by means of an unlawful search and seizure in which no federal officer had participated. A majority of the Court held that this evidence could not be used in a federal criminal prosecution. Justice Stewart, writing for the majority, stated that an important consideration in the adoption of this exclusionary rule was what he called "the imperative of judicial integrity" (364 U. S. at 222-223) for which he found support in the dissenting opinions of Justice Holmes and Justice Brandeis in *Olmstead v. United States*, 277 U. S. 438, 469, 471 (1928).

In *Olmstead*, Justice Holmes had stated (277 U. S. at 469-470) that quite apart from the Constitution, the federal government ought not to use evidence obtained and only obtainable by a criminal act because no distinction should be drawn between the government as prosecutor and the government as judge. Justice Brandeis had declared (277 U. S. at 485) that decency, security and liberty require that government officials shall be subjected to the same rules of conduct as apply to the citizen and that the existence of government would be imperiled if it failed to observe the law scrupulously because when the government becomes a lawbreaker, it invites every man to become a law unto himself.[3]

The rationale of the *Elkins* decision demolished the foundation upon which *Burdeau v. McDowell* had rested. At least one Court of Appeals has concluded that the rule in the latter case has now been changed. *Williams v. United States*, 282 F. 2d 940, 941 (6 Cir., 1960).

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3. In *Mapp v. Ohio*, 367 U. S. 643, 659 (1961), the Court again cited with approval this pronouncement by Justice Brandeis.

Both of the courts below sought to distinguish *Elkins* on the ground that the illegal conduct there involved had been engaged in by state officials, whereas in this case, the disputed evidence had been obtained through private wrongdoing (R. 1220a-1221a; Appendix A). But the danger to judicial integrity is no less in the latter instance than in the former; in both, the courts must necessarily become the recipients of "fruits from a poisoned tree".

The overzealousness of police officers generally springs from their sworn duty to apprehend the lawbreaker. It is seldom that informers are equally well motivated. Most often, they are serving their own petty and selfish ends, and when they employ illegal means to attain their objectives, courts must be vigilant lest they become enmeshed in the whole sordid business.

Moreover, in excluding from the federal courts, evidence illegally obtained by private citizens, no problem arises with respect to the interrelation of federal and state authority. It was this problem which was the chief concern of the dissenters in the *Elkins* case.[4]

Even if *Burdeau v. McDowell* has any remaining vitality, it cannot and should not cover this case. Dombkiewicz and Ferrari illegally took the records for the very purpose of turning them over to the Internal Revenue Service, knowing that they might thereby obtain a reward. A revenue agent got possession of the records at the very time when he discussed that reward with them and furnished them with the applications required to claim it.

In the case of the records taken by Csiesek, the situation is much worse. In making his deal with Csiesek's attorney, the U. S. Attorney, knowing of the documents which the government had already received, must have realized that there was a possibility that Csiesek also had records in his possession. In fact, he stipulated that one of the

4. In his dissenting opinion (364 U. S. at 249-250), Justice Frankfurter proposed a more limited exclusionary rule which, he derived largely from the dissent in *Burdeau v. McDowell*.

condition was the turning over of "any kind of documentary evidence he might have" (R. 532a). The promise of the U. S. Attorney that he would recommend that Csiesek not be given a jail sentence later received at least the tacit approval of a federal judge.

Surely, when federal officials go to such lengths to acquire evidence which they know has been illegally obtained, they cannot divorce themselves from the illegality. *Byars v. United States*, 273 U. S. 28 (1927). By acting as it did, the government both condoned the methods used by the informers and by Csiesek and adopted and ratified those methods for its own benefit. The government went to the very edge of the boundary set by the Fourth Amendment of the Constitution, if it did not in fact violate that boundary. See *Gambino v. United States*, 275 U. S. 310, 316-317 (1927).

Using informers and prevailing upon codefendants to become government witnesses may be necessary evils. But when these persons act illegally in order to be able to aid the government, and the government obtains that aid by holding out the hope of financial reward and by making promises of leniency, the line must be drawn. For if it is not the courts will inevitably become the market place for such trafficking.

2. The Holding of the Court Below That Petitioner Had No Standing to Challenge the Admissibility of the Records Is in Conflict With the Decisions of Other Courts of Appeal.

The Court of Appeals additionally held that since the disputed records belonged to corporations, petitioner "had no basis on which to object to their admission" (Appendix A).[5] It relied upon *United States v. Guterma*, 272 F. 2d

5. In so ruling, the Court of Appeals overlooked the fact that some of the records, which dealt with and analyzed the status of petitioner's Loan and Exchange Accounts and the various credits made thereto, had been prepared by Csiesek for petitioner's use

344, 346 (2 Cir., 1959), and *Lagen v. United States*, 159 F. 2d 245 (2 Cir., 1946), both decided prior to *Jones v. United States*, 362 U. S. 257 (1960). The decision on this point is in conflict with the decisions of two other Courts of Appeal.

In *Henzel v. United States*, 296 F. 2d 650 (5 Cir., 1961), the court held that under the *Jones* case, the president and sole shareholder of a corporation had an interest in the unlawfully seized records of the corporation sufficient to justify the suppression of their use as evidence against him.

In *Wild v. Brewer*, 64-1 U. S. T. C. ¶ 9348 (9 Cir., 1964), the court concluded that the president and sole shareholder of a corporation, who was summoned to produce the corporate records relating to its tax liability, could refuse to do so on the ground that, since he completely controlled the corporation, production of the records might tend to incriminate him in violation of his rights under the Fifth Amendment of the Constitution.

Petitioner was the president of all of the corporations whose records were taken and owned all of their stock. The government kept its possession of the records secret until the trial, and there was no opportunity for anyone to seek their return until they were offered in evidence. Petitioner, the one against whom they were to be used, had the right to their possession; thus, he had a sufficient interest to object to their admissibility.

(R. 258a-264a; Ex. G463, G464). These records were petitioner's property, and he undoubtedly had a sufficient interest in them to challenge their admissibility. Admittedly, these records were fewer in number than those which were corporate records, but they supported the government's position that petitioner knew of the manipulations in which his employees had engaged, and they played a significant part in rebutting petitioner's own testimony (R. 1055a-1058a, 1063a-1064a) that he did not know that the corporate records had been rewritten and was not aware of the credits made to his Loan and Exchange Accounts.

3. The Extent to Which Alternate Jurors May Properly Be Used in a Federal Criminal Case Presents a Question Which Has Not Been, But Should Be, Settled by This Court.

Federal Rule of Criminal Procedure 24(c) provides for the impanelling of alternate jurors "in addition to the regular jury". The use of alternate jurors is covered by the following language:

> ". . . Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. . . ."

When it was discovered in the course of this trial that one of the persons sitting on the jury had never been called to serve as a juror, counsel for petitioner immediately moved for a mistrial (R. 637a-658a) and took exception to the substitution of an alternate juror (R. 659a). The Court of Appeals has decided that in the absence of some specific showing of prejudice, Rule 24(c) permits the use of an alternate even though a regular jury of twelve had not been properly selected and sworn (Appendix A).*

Under Article III, section 2 and the Sixth Amendment of the Constitution, a defendant is entitled to be tried by a jury of twelve, each of whom is selected in accordance with

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* The cases upon which the Court of Appeals relied are not persuasive. In *Gillars v. United States*, 182 F. 2d 962, 980 (D. C. Cir., 1950) the substitution was made before the opening arguments or the taking of any testimony. In *United States v. Gottfried*, 165 F. 2d 360, 365 (2 Cir., 1948), cert. denied, 333 U. S. 860 (1948), the substitution of an alternate was made at the request of defense counsel. In *Larson v. General Motors Corporation*, 148 F. 2d 319, 322-323 (2 Cir., 1945), cert. denied, 326 U. S. 745 (1945), a civil case, the trial judge had offered to declare a mistrial, but plaintiff's counsel refused the offer. The situation in *United States v. Zambito*, 315 F. 2d 260, 269 (4 Cir., 1963), cert. denied, 373 U. S. 924 (1963) comes closer to that in the present case; but in reaching its conclusion, the court relied only upon the *Gillars* case and the decision of the District Court in the instant case.

the law. *See Patton v. United States*, 281 U. S. 276, 288-290 (1930); *Capital Traction Co. v. Hof*, 174 U. S. 1, 13-16 (1899). This requirement is recognized in Rule 24(c) by its reference to "the regular jury" which indicates that the alternates are to be in addition to a jury of twelve which has been properly selected. Until twelve qualified jurors have been chosen, there can be no regular jury.

Moreover, under the Rule, alternates may only replace jurors "who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." This language clearly means that a regular juror may be replaced only when the reason for his disability or disqualification arises *after his selection* and before his retirement to deliberate. Had the framers of the Rule intended that a juror could be replaced if the reason for his disqualification existed at the time of his selection but went undiscovered until after he had been sworn and the case had commenced, they would not have used the words "*become* unable or disqualified".

Until the passage of the Act of June 29, 1932, ch. 309, 47 Stat. 380-381, 28 U. S. C. former § 417a, there was no specific provision in the federal law relating to alternate jurors in criminal cases. That statute authorized the calling of one or two alternate jurors in criminal cases where the trial judge determined that the trial was likely to be protracted and so stated on the record. The statute provided for the use of alternates in the following language:

> ". . . If, before the final submission of the case, a juror dies or become ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

The purpose of this statute, which was introduced at the request of the then Attorney General, was "to prevent

the mistrial of cases wherein a juror dies or becomes so ill as to be unable to continue the performance of his duties" during the course of a lengthy criminal trial. *H. R. Rep. No. 957*, 72d Cong., 1st Sess. In adopting the statute, which was considered necessary because of doubts concerning the authority of federal judges to employ alternates in the absence of an enabling act, there was some concern about the constitutionality of such legislation. *Sen. Rep. No. 866*, 72d Cong., 1st Sess. Both the need for the legislation and its constitutionality were discussed in a memorandum prepared for the Senate Committee on the Judiciary by Walter L. Rice entitled "The Thirteenth Juror in Criminal Cases". This memorandum was made part of the Senate Report cited above.

The Act of 1932 dealt only with the use of alternates in the case of an original juror dying or becoming ill—events which necessarily would occur after a jury of twelve had been chosen. It did not in any way alter existing practices concerning the selection of a jury of twelve or the qualifications of jurors, and it did not cover the case of an original juror who became disqualified to continue his services. The use of alternates under the Act of 1932 was approved without extended discussion in *Tomona Kawakita v. United States*, 190 F. 2d 506, 511, n. 5 (9 Cir., 1951), aff'd 343 U. S. 717 (1952); *American Tobacco Co. v. United States*, 147 F. 2d 93, 117 (6 Cir., 1944), aff'd 328 U. S. 781 (1946); and *Robinson v. United States*, 144 F. 2d 392, 397-398 (6 Cir., 1944), aff'd 324 U. S. 282 (1945). In none of these cases did this Court review the Act of 1932.

When Rule 24(c) supplanted the Act of 1932, the disqualification of regular jurors was specifically covered by the language "become unable or disqualified to perform their duties." The word "become" plainly relates to an event or happening arising after the selection of the regular jury just as it did in the Act of 1932 where it was first used. In this connection, it is significant that the Advisory Committee on the Rules stated that Rule 24(c) "embodies

existing law, 28 U. S. C. A. former § 417a (Alternate jurors), ..." See 18 U. S. C. A. Rule 24(c).

In the present case, because one of the persons sitting on the jury was not qualified to take the oath and serve as a juror, a regular jury of twelve never existed. Hence, it is doubtful whether jeopardy ever attached to petitioner under the Fifth Amendment of the Constitution. The general rule is that the accused is in jeopardy when he is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction, and, in the case of jury trials, a jury has been impanelled and sworn. *Hunter v. Wade*, 169 F. 2d 973, 975 (10 Cir., 1948), aff'd 336 U. S. 684 (1949). If Rule 24(c) is interpreted to permit the use of an alternate to cure the defect existing in this proceeding, there would be a serious question about its constitutionality. In view of the concern about the constitutionality of the use of alternates in any situation, to which we have already alluded, the Rule should be interpreted so as to avoid this problem.

A defendant in a criminal case should not be required to demonstrate some specific prejudice when there has been a serious irregularity in the selection of the jury which tried him. The principle of harmless error does not cover matters which are fundamental, and the jury is perhaps the most fundamental part of our system of criminal procedure. Rules relating to the qualifications, selection and use of jurors should never be loosely construed so as to achieve in a particular case what appears to be simplicity and efficient administration. Such construction will almost invariably lead to carelessness or worse, and the jury system would inevitably suffer. It has long been held that criminal laws must be strictly construed. *United States v. Mersky*, 361 U. S. 431, 440-441 (1960), wherein the Court stated ". . . . In the framework of criminal prosecution, unclarity alone is enough to resolve doubts in favor of defendants." This principle should be applied to the interpretation of Rule 24(c).

We have found no cases in which this Court has passed upon Rule 24(c). The question posed by the present case, which is important in the proper administration of criminal justice, provides an appropriate opportunity for the Court to do so. The decision of this Court is needed to set at rest all doubts about the meaning of the Rule and any constitutional limitations on the use of alternate jurors.

CONCLUSION.

For the reasons set forth herein, we respectfully submit that this petition for a writ of certiorari should be granted.

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APPENDIX A.

OPINION BELOW.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,148.

UNITED STATES OF AMERICA

v.

MORRIS C. GOLDBERG, ALSO KNOWN AS MOE GOLDBERG AND M. C. GOLDBERG,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued June 5, 1963.

Before: BIGGS, *Chief Judge*, McLAUGHLIN and GANEY, *Circuit Judges*.

OPINION OF THE COURT.

(Filed March 17, 1964.)

By GANEY, *Circuit Judge*.

The appellant here, Morris C. Goldberg, was convicted after a trial by a jury in the District Court for the Eastern District of Pennsylvania, under an indictment wherein he was jointly charged with Rudolph Ciesesk (hereinafter known as "Rudy") with several offenses concerning income taxes due from him personally, as well as from some corporations, thirteen in number, which he allegedly controlled. The indictment contained fifty-one counts and covered the years 1955 and 1956, pursuant to 26 U. S. C. Sec. 7201 (1954).

Rudy subsequently plead nolo contendere, later numerous counts were withdrawn, and the only ones submitted to the jury were one, two, three, four, five, seven, eight and nine. A verdict of guilty on all counts was rendered by the jury and later the court granted the appellant's motion in arrest of judgment as to count one. Accordingly, on this appeal we are concerned only with counts two, three, four, five, seven, eight and nine.

The respective counts are as follows: Count two charged the appellant, Goldberg, with wilfully and knowingly attempting to evade a large part of his individual taxes owing to the Government by filing and causing to be filed a false and fraudulent individual income tax return for the year 1955. Count three charged the appellant with the same offense for the year 1956. Count four charged the appellant, as President of the Pennsylvania Coat and Apron Supply Co. of New Jersey, with wilfully and knowingly attempting to evade a large part of the taxes owing by that corporation for the period January 1, to September 1, 1955, by filing and causing to be filed a fraudulent tax return for that corporation. Count five charged the appellant, as President of the Penn. Ivania Laundry Co., with the same offense for the calendar year 1955. Count seven charged the appellant, as President of the Pennsylvania Coat and Apron Supply Co., a Pennsylvania corporation, with the same offense for the calendar year 1956. Count eight charged the appellant, as President of Anderson's Empire Coat, Apron and Towel Supply, Inc., with knowingly and wilfully evading a large part of the taxes due and owing to the Government by that corporation, by causing to be prepared and causing to be filed in the District of Camden, Camden, New Jersey, a false and fraudulent return for that corporation for the calendar year 1955. Count nine charged the appellant, as President of Anderson's Empire Coat, Apron and Towel Supply, Inc., with the same offense for the calendar year 1956.

The record discloses that the appellant, as President of some thirteen corporations which were engaged largely in the linen supply business, directly or indirectly owned all of the stock in these corporations. In addition to the corporations here above mentioned, there must be included also the Keystone Coat and Apron Manufacturing Corp., the Keystone Mercantile Corp. and Gold Tex Fabrics Corp.

On December 31, 1954, the Loans and Exchange Accounts in appellant's corporations showed that he was personally indebted to them in the sum of $387,390.14, largely carried on the books of the Keystone Coat and Apron Manufacturing Corp. and the Keystone Mercantile Corp., and as of June 22, 1955, this amount had been reduced to the sum of $280,000.00. These Loans and Exchange Accounts were made up of checks issued by the corporations to the appellant for his personal use and deposited in banks to his personal account and, additionally, amongst other things, in connection with oil gas leases, race track betting, as well as checks made payable to other individuals or corporations at appellant's direction and included the years 1955 and 1956.

In order to meet expansion programs and to have a more efficient operation of his business, the appellant sought a long-term loan of $2,000,000 from the Jefferson Life Insurance Company early in 1955. The insurance company advised him, after making a survey of his various corporations, including visits to his plants, that they would grant the loan if his personal indebtedness to the corporations was reduced by $120,000, as of September 1, 1955, and if the Pennsylvania Coat and Apron Supply Co. became merged with the Pennsylvania Laundry Co. as of that date. This seemed like an impossible requirement and the appellant attempted to borrow $280,000 in June of 1955 from a certain bank in Philadelphia, but being unable so to do, he undertook to meet the insurance company's requirement by proposing to it in a letter dated June 18th, that he reduce

his indebtedness, as evidenced by his Loans and Exchange Accounts in 1955, by paying off $76,000 in July, $90,000 in August, and $10,000 a month as a minimum thereafter. As of September 1, 1955, the merger of the Pennsylvania Coat and Apron Supply Co. with the Pennsylvania Laundry Co. was completed and the appellant's personal loans to his various corporations were reduced so that the loan from the Jefferson Life Insurance Company of $2,000,000 was granted, although his income was $50,000 from Keystone Coat and Apron Supply Co. and $9,766 additional income, making an adjusted income of $59,766 for the year 1955, and he made no resort to outside borrowing.

Through a series of financial operations tedious in nature, the lengthy record discloses a complex accounting practice, yet simple in the results sought to be achieved—the filing of fraudulent tax returns—which we shall briefly review. Rudy was employed by the appellant for the period from October, 1946, to June of 1956, and then from September or October of 1956, to June of 1958. He started as a bookkeeper with the appellant, later became an accountant, then became controller of all his corporations and finally administrative assistant to him, in which capacity he had supervision and control of all the books and records of the corporations covering the years set forth in the indictment, to wit, 1955 and 1956.

The record discloses that in January of 1955, Rudy was called into the appellant's private office and there appellant told him he should take the cash and sales journals of the Pennsylvania Coat and Apron Supply Co., beginning with January, 1955, and re-write them by reducing the cash sales, as shown from the cashier reports, which reflected the cash collected by drivers of the appellant, in an amount that would be around $3,500 per week, not in the same amount, each and every week, but on an over-all period which would average out to $3,500 per week. After re-writing the original sheets, the amounts so reduced were to be credited to appellant's Loan and Ex-

change Accounts in his corporations showing, in effect, a repayment in the same amount by the appellant. Pursuant to these instructions, Rudy worked up the payment sheets which were rewritten on a weekly basis, whereas they had been written on a daily basis; and showed them to the appellant who told him that was the way he wanted the matter done. However, since it required a great deal of time to so do, the appellant suggested that it be turned over to someone else, and Rudy mentioned Dan Ferrari, who handled the books of the Pennsylvania Coat and Apron Supply Co., and appellant approved thereof and advised Rudy to instruct Ferrari as to how the cash and sales journals were to be written and the same amounts credited to his Loan and Exchange Accounts. The appellant gave specific instructions that after the cash and sales journals had been rewritten, the original records should be destroyed by both Rudy and Ferrari, who did all the rewriting of the sheets, which, as stated, showed reduced cash income and a corresponding credit to appellant's Loan and Exchange Accounts in the various corporations. However, they did not destroy them, but placed the originals in files in their offices under their custody and control, never advising the appellant of their so doing, the larger part of which Rudy gave to the Government.

An instance typical of the operation which was carried on by Rudy is that of the Pennsylvania Coat and Apron Supply Co. of New Jersey. Here, the original cash receipts and sales journals for this corporation showed a total income through sales for the month of January, 1955, of $147,599.50. When rewritten by him, pursuant to the appellant's instruction, the cash receipts and sales totaled sales of $133,599.50, or a reduction in cash sales of $14,000.00, and then this exact sum was shown as a repayment to the appellant's Loan and Exchange Account. For the same corporation for the month of February, 1955, the original receipts and sales journals showed total cash sales of $143,504.82, which cash sales were rewritten by

Rudy, at the appellant's instruction, to show a total cash sales of $128,504.82, or a reduction in cash sales of $15,000.00, which was carried over to the appellant's Loan and Exchange Account as an alleged repayment by the appellant.

Ferrari carried on the operation, as directed by Rudy, by rewriting sales journals and crediting the amount to the Loan and Exchange Accounts and during an interim period when Rudy had left appellant's employ, out of an abundance of caution, he questioned appellant in June of 1956, and appellant told him to carry on as Rudy had previously told him, which he did, until he left appellant's employ in April of 1958. Typical of the operation carried on by Ferrari was Anderson's Empire of Atlantic City for July, 1955. Here the original record showed total sales in the cash receipts and sales journal of that corporation for that month of $119,173.68 and the rewritten record by Ferrari showed total sales for that corporation of $79,173.68, or a difference of $40,000.00. On the front of the rewritten sheet was a notation in quotation marks, "A July 1955 M", which indicated to Ferrari that $40,000.00 was to be the amount of the sales reduction, as directed by Rudy, as the notation was in his, Rudy's, handwriting. Here, again, the $40,000.00 was credited to appellant's Loan and Exchange Account.

It would serve no useful purpose to recite the exceedingly numerous rewritten sheets during 1955 and 1956, showing reductions in cash sales and an identical credit to appellant's Loan and Exchange Account covering the years laid in the indictment. Suffice it to say the Government's contention is that the appellant by causing the repayments to his Loan and Exchange Accounts in the amounts of the falsely reduced sales were income to him in those years, if when he withdrew the funds, his intention was to repay them, and the trial court specifically so charged. The jury found an intent to repay these personal funds and thus was created income to him in those years.

The admission into evidence of the rewritten sales sheets, on which the Government predicated the allegations in the indictment, that the appellant had defrauded the Government in the filing of his personal returns as well as those of the corporations—since both the personal and corporate returns were based on these sheets—while vigorously fought on other grounds, during the trial of the case, neither in argument nor in their briefs, did counsel deny that the comparison of the original sales records with them and on which the returns were made in Pennsylvania Coat and Apron Supply Co. of New Jersey for 1955, Pennsylvania Laundry Co. for 1955, Pennsylvania Coat and Apron Supply Co. for 1956, as well as Anderson's Empire for 1955 and 1956, had been substantially understated.

Ferrari was in the employ of the appellant, as an accountant from April, 1953, until April of 1958; and rewrote most of the records hereinabove adverted to, from March of 1955, until the end of December, 1956, the years in question. When he left in 1958, he took with him, without the permission of the appellant, records pertaining to the sales of Pennsylvania Coat and Apron Supply Co. of New Jersey, and Anderson's Empire and turned them over to the Government on August 5th, 1958. He was the first person to contact the Government agents, which he did by telephoning the Internal Revenue Service on August 2nd, 1958, making an appointment with the Government agents for August 4th, 1958.

Raymond Dombkiewicz was an accountant and office manager for the appellant from October, 1954, until August, 1958, and during the year 1955, he was an accountant for Keystone Coat and Apron Manufacturing Corp. and for Gold Tex Fabrics Corp. In August, 1958, he left the appellant's employ, at which time he took with him records pertaining to the appellant's Loan and Exchange Accounts with Pennsylvania Coat and Apron Supply Co. of New Jersey, as well as the same corporation of Pennsylvania,

and cashier reports concerning the sales of these corporations and those of Pennsylvania Laundry. These records covered the years 1955 and 1956. Dombkiewicz and Ferrari discussed the case with the agents on August 4th, 1958, and on August 5th, they both filed applications for informer's fees and after so doing, they turned over the records they had taken from the appellant to the Government agents. In the instance of Rudy, however, he had been indicted on February 16, 1961, had changed his plea from guilty to nolo contendere on April 14, 1961, and turned the records he had taken over to the Government agents on April 18, 1961. However previous to their being turned over, he had received definite assurance from the United States Attorney and, by a simile, from the court, that if he cooperated with the Government he would not go to jail. This cooperation envisaged, among other things, the turning over of any documentary evidence he might have, though it is clear that neither the United States Attorney nor the Government agents knew what the documents were, which he had in his possession and which he turned over, until they examined them.

It is clear beyond contradiction that in the instances of the three main Government witnesses, Rudy, Dombkiewicz and Ferrari, the Government had no part or knowledge that they were going to take the records they turned over. Rudy's own counsel or the United States Attorney knew nothing thereof, until after Rudy's plea was changed and, with respect to Ferrari and Dombkiewicz, the uncontradicted evidence discloses the taking of the records prior to any communication with any Government officials. The most than can be said for the appellant's case is that in the case of Rudy, he had the assurance that, by cooperating, he would not go to prison and, in the instances of Dombkiewicz and Ferrari, they were to receive an informer's reward. At best this went to the credibility of these witnesses whom the jury saw and heard and, by their verdict, finally believed, and, as the lower court phrased it,

the Government was "the unwitting beneficiary" of their wrongful taking. Was their admission error?

We think the documents and records were clearly admissible under *Burdeau v. McDowell*, 254 U. S. 465. Here, certain of McDowell's business associates had taken from his safe, without his knowledge, certain documents and had turned them over to Government officials. McDowell then filed a petition seeking their return, as they were about to be presented to a Grand Jury. Here, the evidence established that no Government official had participated in or had been connected with the taking and that since the documents came into their possession without a violation of McDowell's rights by any Government authority, the Government could retain them and use them as evidence. In our instance, additionally, the records were not personal records of the appellant, but belonged to the various corporations concerned and since they were, the appellant had no basis on which to object to their admission. *United States v. Guterma*, 272 F. 2d 344; *Lagow v. United States*, 159 F. 2d 245.

The appellant contends the force and effect of *Burdeau v. McDowell*, supra, has been greatly weakened, if not changed, by *Elkins v. United States*, 364 U. S. 206. Here, state officers had seized certain tape recordings and a recording machine as the result of an unlawful search and seizure which had, in no wise, been participated in by any federal officer and the court held that the evidence so seized could not be used in the trial of the case and set aside the defendant's conviction. This case reversed the trend of previous federal decisions by refusing to admit evidence offered as the result of an illegal search and seizure by state officials even where no participation was had by federal officers. However, here again the court was only concerned with state action and its ruling, in no wise, impaired *Burdeau v. McDowell*, supra. While the appellant contends that "The imperative of judicial integrity", coined in this case, would be violated in prin-

ciple, just as much by a private individual, it is paradoxical that the appellant here should invoke that doctrine when the material offered in evidence against him was the true and actual records of his corporation's sales, which were to be destroyed at his specific direction, and in the face of this fraudulent scheme, to give him the cloak of its protection would be most unseemly.

The next error the appellant complains of was the admission by the court of Exhibit D7. D7 was first brought out on the cross-examination of Rudy by the appellant and consisted of a summary made in his handwriting, which the appellant contends was the actual closing inventories of the corporations here involved. The amount of the inventories shown thereon was substantially less than the closing inventories stated in the tax returns filed by the respective corporations and the contention of the appellant is that the difference shown on the inventories on D7 and the inventories reported in the tax returns were equal to the amounts by which the sales were understated. However, it was not brought out and the record does not disclose where Rudy got the figures, whether they were accurate or imaginary, whether he got them from the books of the corporations or from the firm which audited the books. It contained certain erasures, overwriting, marks crossed through, and additional figures written above the same. As has been stated, the summary was brought out during Rudy's cross-examination and yet counsel for appellant made no attempt to question him about it, and the physical condition of Rudy made it impossible for the Government to later recall him in rebuttal and make explanation in connection therewith.

It is submitted that there was no error in the admission of D7, inasmuch as the court charged that if the jury believed that D7 correctly stated the actual closing inventories and, as a result, the expenses of Pennsylvania Coat and Apron Supply Co. of New Jersey for 1955, Pennsylvania Coat and Apron Supply Co. of Pennsylvania for

1956, Pennsylvania Laundry Co. for 1955, and Anderson's Empire for 1955 and 1956, were understated in the returns to an amount equal to any understatement of sales, there would be no taxable income due the Government, in which event they should find the appellant not guilty on counts four, five, seven, eight and nine. It is submitted that his instruction is correct and that appellant was, in no wise, prejudiced. The appellant's contention is that it should have been accepted as accurate forthwith since the Government had the burden of investigating the truth or falsity of the closing inventories, citing *Holland v. United States*, 348 U.S. 121. However, this case is, in no wise, apposite, since that was a tax evasion case in which the Government relied on certain net worth computations by, if and the court held it was requisite, where certain leads were used to prove the defendant's guilt, that the Government had the burden of investigating them and, failing to so do, the Government's case was insufficient to go to the jury. Here, the appellant requested that the court charge that the Government had the burden of investigating the truth or falsity of the closing inventories in D7 and since they did not, the jury could conclude that the Exhibit D7 showed the actual closing inventories without proof of its correctness by the appellant. Here, however as the court below points out, the inventory figures on the tax returns filed were the corporate taxpayer's own figures, not the Government's, and it could not require of the Government the duty of determining which figures were correct, that of appellant's corporate returns or an entirely different set of figures compiled by the corporation's own accountant and brought on the record by the appellant. Additionally, the record discloses that the Government agents made every attempt to check into the inventories and the condition of every one of the corporations here involved, by making repeated requests for inventory information, but they were unable to secure the same and they had nothing

else to do but assume that the inventory returns were correct.

The next alleged error on the part of the court is its refusal to instruct the jury, as requested in appellant's Point for Charge 4, which reads as follows:

> "Even if you are convinced beyond a reasonable doubt that there was a conspiracy between Goldberg and Ciesek which, as alleged in the indictment, began on or before January 1, 1954, then such a finding would be inconsistent with the theory upon which the prosecution rests on the charges contained in Counts 2 and 3 of the indictment, and you must then find Goldberg Not Guilty on Counts 2 and 3."

It is the contention of the appellant under this proposed Point for Charge that the conspiracy count of the indictment charging Rudy and the appellant with conspiring, beginning on or before January, 1954, to evade and defeat appellant's income tax for the years 1955 and 1956, by making false and fictitious entries in the books and records of the corporations controlled by the appellant, was tantamount to averring that there never was any real indebtedness owed by the appellant to his corporations and if there ever was any realizable income, it was from the withdrawals of funds from them. The contention, more particularly set forth on page 33 of the appellant's brief, states, with reference to count one, "Thus, if this charge is correct, there never was any real indebtedness incurred by Goldberg, and if he had any income, it was realized when he withdrew funds from the corporations and not when credits were made to his Loan and Exchange Accounts." The inconsistency which the appellant asserts is that a finding of guilty on count one precludes the finding of guilty on counts two and three, the substantive counts. With this we disagree. All of the overt acts in the first count were withdrawn before the case was submitted to the jury, with the exception of overt acts Nos. 25 and 26,

which charged the filings of fraudulent returns for the years 1955 and 1956. However, appellant here takes the position that since the conspiracy as alleged, began on or before 1954, when there was owing by the appellant more than $300,000, as of December 31, 1954, the withdrawals it represented were income to him at the time, which was for a taxable period previous to the years 1955 and 1956, as laid in counts two and three, and, accordingly, there is a contradiction therein. However, the false entries by which the conspiracy was to be accomplished, as alleged in count one, were not the withdrawals in 1954, nor at any later date, but the false entries on the sales sheets in 1955 and 1956, and there crediting to his Loans and Exchange Accounts.

As the case went to the jury, there was then no necessity for the trial court to give Point for Charge No. 4, since it did charge the jury with respect to Point No. 3,

> "If you find that at the time defendant withdrew funds from any of the corporations involved in this case, he had no intent to repay the funds withdrawn, then such withdrawals constitute income to him in the year they were withdrawn, and the credits which he may have received subsequently do not constitute taxable income to him and are insufficient to justify a guilty verdict on Counts 1, 2 and 3 of the indictment."

Again, the conspiracy in count one recites the receipt of income during 1955 and 1956, from Pennsylvania Coat and Apron Supply Co., a New Jersey corporation, Anderson's Empire Coat, Apron and Towel Supply Co., a New Jersey corporation, and Pennsylvania Laundry Co., a Pennsylvania corporation, which he failed to report in his returns for those years, by causing to make false and fictitious entries in the books of these corporations. Those were the entries made by the rewritten sales sheets. Furthermore, the appellant's repeated contention that the withdrawals were income in spite of the charge in Point

No. 3, and in the face of the appellant's own testimony that the withdrawals constituted an indebtedness, cannot be sustained and impels the definite conclusion that there was no error in failing to charge Point No. 4. It is to be remembered, however, that while the court granted the appellant's motion for arrest of judgment as to count one, it was after the verdict and has no bearing on the merits here discussed.

The next error alleged by the appellant is that the trial judge failed to instruct the jury as to the limitations on the taxability of corporate distributions. The trial judge, during the course of his charge, had adverted to the inclusion of dividends in gross income, but later withdrew what had been said concerning it and told the jury to totally disregard it and that, in determining the ultimate taxable income, there was no necessity for the jury to consider the definition of dividends or the exceptions thereto. Here again, counsel repetitively urged that the credits received by the appellant when his Loan and Exchange Accounts were credited came to him as a corporate distribution in the nature of a dividend and that something necessarily had to be said with respect to the limitations of these distributions imposed under the Internal Revenue Code, 26 U. S. C. Sec. 316. It can only be repeated again that the Government's case, the indictment and the evidence introduced in proof of the charges had nothing to do with dividends, but that the income was only realizable to appellant when his indebtedness to the corporations, as shown in his Loans and Exchange Accounts, were repaid.

It is contended by the appellant that some authorities, in civil cases, denominate withdrawals as loans, and treat them in fact as dividends which constitute taxable income to the recipient at the time of the withdrawal, strongly relying on *Spheeries v. Commissioner*, 284 F. 2d 928 and *Roschani v. Commissioner*, 271 F. 2d 267. The appellant can find no support in these cases, for his contention

merely buttresses the position of the Government. In these there were findings of fact that the withdrawals were not borrowings, but dividends. However, in *Spheeries v. Commissioner*, supra, at p. 931, the court specifically stated that it used as a guide, in its determination thereof, the subjective intention of the parties which was exactly the same instruction which the lower court gave to the jury and they determined, by their verdict, that they were borrowings.

This view is pointed up in *Davis v. United States*, 226 F. 2d 331, 335, where it is stated: It is not necessary to go into the legality of the so-called distribution by appellant's wholly owned corporation, to himself, or his extraction of the cash from the corporation, as it clearly appears that through the fraudulent transactions in which he was engaged, he received the cash over which he had complete control, which he took as his own, treated as his own, which resulted in economic value to him, and for which he probably never would have been required to account, had it not been for the discovery of the fraud on the revenue which he was perpetrating. Briggs v. United States, 4 Cir., 214 F. 2d 699. . . . Appellant makes much of the fact that the government has not fixed a label of some kind on the funds that he took from his corporation. It is not necessary to describe them as additional salary, illicit bonuses, or commissions, or anything more than wrongful diversions, since, as above mentioned, substance controls over form, and taxation is concerned with the actual command over the property taxed. To the same effect is *Cohen v. United States*, 297 F. 2d 760, 768. Accordingly, we see no error in the court's failure to instruct the jury concerning limitations on the taxability of corporate distributions.

The next ground alleged as error is that the verdict on counts two and three and on counts four, five, seven, eight and nine are repugnant to one another and the evidence could not support the verdicts on the former and

the latter. The contention of the appellant is that ". . . the money coming from the suppressed sales was either income to the corporation or to Goldberg, but could not be income to both." The argument runs that what appellant did constituted embezzlement and under the law as it existed at that time, embezzled funds were not income in that the appellant had no corporate authority for any of the withdrawals. Here, the appellant, in support of his view, cites *Commissioner v. Wilcox*, 327 U. S. 404. If we examine the facts in that case, it shows that Wilcox was merely a salaried bookkeeper employed by a Transfer and Warehouse company and that various sums of money which he had collected from customers, which were owing to his own company, he took and converted to his own use making no record of the sums he had so taken on the books of the company. Here, the court held under 26 U. S. C. Sec. 22(a) that embezzled funds were not taxable.

In order to thoroughly appraise *Wilcox*, supra, we must consider *Rutkin v. United States*, 343 U. S. 130, wherein it was held that extorted funds were taxable income. Here, the facts showed that Rutkin had failed to report in his income tax return $250,000 which the jury found he had extorted by threats from one Reinfeld. The court, referring to *Wilcox* supra, stated specifically that it had confined its decision solely to the facts of that case. Accordingly, as stated in *Marienfeld v. United States*, 214 F. 2d 632, 637, the line of demarcation between the two cases must be determined by the facts in the individual case and it is submitted the facts in this case more clearly favor *Rutkin v. United States*, supra, in conformity with a similar comparison in this court by *Kann v. Commissioner*, 210 F. 2d 247. Finally, in *James v. United States*, 366 U. S. 213, 217, *Wilcox*, supra, was specifically overruled and in so doing the court stated: "Examination of the relevant cases in the courts of appeals lends credence to our conclusion that the *Wilcox* rationale was effectively vitiated by this Court's decision in *Rutkin*." "Accordingly, since *Rutkin*

was decided in 1952, we must now hold that even if appellant's conduct was embezzlement, the income was taxable, since *Wilcox* was decided in 1946.

The rule is well established that unlawful, as well as lawful gains, comprise taxable income whenever the person receiving it, as a practical matter, has such control over it that he derives realizable economic value from it, *Burnet v. Wells*, 289 U. S. 670, 678; *Corliss v. Bowers*, 281 U. S. 376, 378.

It is submitted the issue here concerns itself with whether money fraudulently taken by a person who owns and controls certain corporations and treats the same as an indebtedness, intending to repay it, is an embezzler in the sense that he was so determined, under the facts in the *Wilcox* case. Appellant was not, in any sense, an employee, as Wilcox was, for in fact he was the real owner and an employer himself. Here there was no such taking as in the *Wilcox* case, where actual cash was taken by Wilcox and put in his own pocket without making any record thereof on the books of the company. Here was a scheme, fraudulent, deliberate and devious, persisted in for years, of taking from his corporations unreported income in excess of $300,000, as of December 31, 1954, as well as large sums during 1955 and 1956.

Here, we must remember money actually came into the business of these corporations in the form of cash; it was under their custody and control and recorded on their books and this money so recorded was fraudulently diverted or taken from the corporations at the direction of the appellant by rewriting the records and showing their corporate income reduced by large amounts and authorizing the original corporate records to be destroyed, facts which no case cited by the appellant is comparable to. Further, it is not this Court's province to differentiate legal issues between the appellant and his corporations, yet even so, it has been held that a defendant cannot be guilty of embezzlement of funds from his wholly owned

corporations as here, *United States v. Augustine*, 188 F. 2d 359, *Kann v. Commissioner*, supra, for as said in *Corliss v. Bowers*, supra, "... taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

The appellant relies heavily upon *J. J. Dix, Inc. v. Commissioner*, 223 F. 2d 436, as a comparable civil case. In that instance, the court upheld the taxation of the funds to the corporation but ruled, as to the stockholder, the monies received were the proceeds of his embezzlement and under the law existing was not taxable income. However, in the *Dix* case, supra, the Tax Court found that for the period in question $196,870.60 realized from corporate sales was secretly deposited in two banks and the amount so received was not recorded on their books nor included in their gross receipts on its tax returns. The corporation was controlled by one Jacob Dix, who through the domination of his son, fraudulently withheld the re-entry of these receipts from the corporation books and the Tax Court found that the gross income had been understated in the amount above described and fixed a tax deficiency of $62,054.23. As to Jacob Dix, the president of the corporation, he realized taxable income of some $56,000.00, which was the amount of the corporate funds he misappropriated, by simply drawing the money from the corporate bank account and diverting it to his own personal use which he, likewise, did not report as income. While the Tax Court held that diverted income from corporate sales was taxable, it relied on *Wilcox v. Commissioner*, supra, and held that mere withdrawal of the funds by the president of a one-man corporation was more similar to the *Wilcox* case than to *Rutkin v. United States*, supra, but, as we have pointed out above, little, if any, vitality remains in *Wilcox*. The holding of the Tax Court, with respect to the defendant Dix, here again can be distinguished from our case, as the misappropriation by him of drawing funds from

the bank is not, in any wise, like the devious, fraudulent scheme devised by the appellant. Additionally, while civil tax cases may be helpful under appropriate circumstances to draw analogies, they are to be distinguished from criminal cases especially with respect to the nature of the proof required. This is plainly stated in a civil tax case, *Simon v. Commissioner*, 248 F. 2d 869, 876: "In criminal income tax evasion cases, the exact amount of the tax evaded is not an important consideration. In criminal cases, it is necessary to prove only that the tax on some income has been fraudulently evaded. On the other hand, in civil proceedings for the collection of tax, an accurate determination of the accumulated corporate earnings is necessary to determine the amount of tax liability."

Accordingly, the individual liability of the appellant, as alleged in counts two and three, is, in no wise, repugnant to counts four, five, seven, eight and nine, which taxed the corporate income, for the reduction of his Loan and Exchange Account was an economic benefit to him, income, since his indebtedness to his corporations was reduced, and the rewriting of sales sheets diminished corporate income, each being separate and distinct schemes, and the ends of justice require them to be treated as such.

The next ground for error alleged by the appellant concerns itself with the admission of several letters handed to appellant, addressed to the respective corporations which he owned and controlled. There were two letters, one addressed to the Pennsylvania Coat and Apron Supply Co. and the other addressed to the Pennsylvania Laundry Co., both dated November 19, 1958, requesting permission to examine the books and records of the companies for the years 1954 and 1955. The trial court admitted the letters. Appellant's complaint is that they might possibly have been harmful to him since his cooperation in the investigation might have incriminated him under the Fifth Amendment. Here, again, the letters were addressed to the corporations and not to the appellant and, accordingly, as

adverted to heretofore, he had no right to claim the Fifth Amendment with respect to the examination of the corporations' books and records. Furthermore, the trial court admitted the letters for the limited purpose of showing a request by the Government, addressed to both corporations, for the purpose of examining their books. This was the first occasion the Government agents had ever met appellant and they apprised him, orally, of the Government's desire to investigate both corporations, which was the sole content of the letters. We see no error in their admission.

The next ground alleged as error is the denial of the appellant's motion by the trial court for a mistrial because one of the twelve jurors, Ida B. Robinson, had not been properly qualified to serve as a juror. . .

Among those summoned for possible jury duty was one Ida B. Robinson, who was No. 85 on the Petit Jury List, and one Lottie P. Robinson, No. 86 on that List. After reporting for duty, Lottie Robinson had been duly excused from possible service by the judge, then in charge of the criminal list, but by inadvertence her tag No. 86 remained in the box containing tags, bearing a number, each of which corresponded to a number before the name of a person on the Petit Jury List. When the first group from which twelve jurors would be chosen was in the process of being selected, the deputy clerk, on the twenty-third draw, drew tag No. 86 from the box, referred to the List and called No. 86 and the name of Mrs. Lottie Robinson. Mrs. Ida B. Robinson, No. 85 on the List, responded and seated herself in seat No. 20 of the first group. She occupied that seat because three of the previous twenty-two persons whose tabs were drawn had been excused for cause because their service on the jury at the time would have been a serious inconvenience to them. When twenty-eight out of thirty-five persons of the first group had been seated in succession, the presiding judge suggested that the persons whose tabs were thereafter drawn be seated in a second group from which the four alternates would be selected.

Defendant made no objection to this suggestion. Omitting one that was excused for serious inconvenience, the tags of eight persons were then drawn from the box and the eight persons were directed to sit in the order that they were called, in consecutively numbered seats.

After the voir dire examination of both groups had been completed, the remaining persons who had been summoned but whose tags had not been drawn were released for duty in another courtroom. Tag No. 85 was never drawn in this case. Thereafter, sixteen members of the first group were withdrawn as a result of their being challenged. This left exactly twelve persons seated in the first group occupying the following numbered seats: Nos. 2, 3, 4, 5, 8, 9, 11, 14, 15, 17, 20 and 23. At the request of the deputy clerk the person seated in No. 14 seat was asked to sit in No. 1, 15 in 6, 17 in 7, 20 (Mrs. Ida B. Robinson) in 10, and 23 in 12. In so doing, the deputy clerk directed Ida, calling her Mrs. Lottie Robinson, to take seat No. 10. Thereafter, the persons sitting in the 2nd, 4th, 5th and 7th seats of the second group were challenged and the remaining four persons were asked to take seats 13 to 16 in the order they were called. This group as a jury of twelve and four alternates were then sworn to try the appellant. Before the trial got underway, by agreement of counsel for both sides, with the approval of the trial judge, the person sitting in the No. 2 seat was replaced by the first alternate juror, No. 13, leaving three alternates.[1]

On the ninth day of the trial, a deputy clerk of court discovered No. 10 juror's true name and informed the trial judge of this fact. When he, in turn, notified counsel for both sides, appellant moved for a mistrial on the ground that juror No. 10 had not been properly qualified to take the oath and serve as a juror. The Government opposed the motion but left it to the trial judge whether to let Ida serve as a juror or replace her with an alternate. The trial judge denied the motion and directed that

1. The reason for the replacement does not appear in the record.

Ida be withdrawn and replaced by the then first alternate, No. 14. Appellant objected to the replacement. The trial then continued for another fourteen days. Immediately prior to the jury's withdrawal for deliberation after a twenty-three day trial, the two remaining alternates were excused from further duty in the case.

Under Article III, Section 2, and the Sixth Amendment of the Constitution, a defendant is entitled to be tried by a jury of twelve. *Patton v. United States*, 281 U. S. 276, 288-290; *Capitol Traction Co. v. Hof*, 174 U. S. 1, 13-16. Had Ida not responded to the calling of the name of Lottie, and since Lottie had been excused, juror No. 11 would have been juror No. 10 and No. 12 would have been No. 11. The first alternate, who became juror No. 2, would have been the 12th juror, and the second alternate who became juror No. 10, would have been juror No. 2 instead. Thus the appellant was tried by the same combination of twelve people as he would have been had Ida not answered to the name of Lottie. All of them were present during the testimonial portion of the trial and also when the trial judge delivered his instructions. And as the trial judge pointed out: "The jurors who passed upon his plea were all properly qualified to serve as jurors, had been carefully examined on voir dire and found acceptable."[2] The only difference being that the appellant was deprived of the services of an additional alternate for which he does not complain. Nevertheless he argues that the jury was illegally sworn from the beginning because of the presence of Ida, and by reason thereof, there was in legal contemplation no jury in which a substitution could be made. The Government concedes that Ida, since she was never called to sit in the first or second group, was subject to being withdrawn from the jury box at the time of the trial judge's action. Did the Court's action require that appellant be awarded a new trial. We do not think so.

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2. 206 F. Supp. 394, 399 [(E. D. Pa. 1962)].

Until the passage of the Act of June 29, 1932, c. 309, 47 Stat. 380, 28 U. S. C. (1940 Ed.) § 417a,[3] there was no specific provision in the federal law for the selection of alternate jurors in criminal cases. Since September 1, 1948, authority for selecting them is derived from Rule 24(c) of the Federal Rules of Criminal Procedure. This Rule provides as follows:

> "(c) alternate Jurors. The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. . . ."

Appellant maintains that the reference in this subsection of the Rule to "the regular jury" indicates that the alternates are in addition to a jury of twelve which has been properly selected. The jury need not be twelve in number, but may be of a lesser number. *Patton v. United States*, supra, at p. 299. This is apparently the reason why the subsection uses the expression "the regular jury" as a convenient reference to a group that is selected according to some prescribed rule or established usage.

Appellant also insists that, according to the subsection of the Rule, alternates may only replace jurors "who, prior

3. Repealed by Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, effective September 1, 1948.

to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." This language, appellant argues, clearly means that a regular juror may be replaced only when the reason for his disability or disqualification arises after his selection and before his retirement to deliberate. Had the framers of the subsection, the argument runs, been of the view that a juror could be replaced where the reason for his disqualification existed at the time of his selection, and went undiscovered, until after the jury was sworn and the trial commenced, they would not have used the words, "became unable or disqualified". Appellant appears to lose sight of the fact that the challenge of a juror for cause may be waived by the accused and the prosecutor. Here the appellant, after he learned of the real identity of Ida, could have consented to her serving on the jury.[4] Instead he objected to her doing so by asking for a mistrial. It was at this juncture that Ida became "unable or disqualified" to serve on the jury. This could not have been known until appellant raised his objection. That Ida was subject to being withdrawn upon being challenged from the time she responded to the name of Lottie cannot obliterate that fact. At least two Courts of Appeals have decided that Criminal Rule 24(c) does not prevent the replacement of a juror by an alternate juror after the jury has been sworn. In one, the existence of the disqualifying factor was discovered before testimony was taken. *Gillars v. United States*, 182 F. 2d 962. In the other, midway during the trial. *United States v. Zambito*, 315 F. 2d 266, 269, cert. den. 373 U. S. 924. Also see *United States v. Gottfried*, 165 F. 2d 360, 365, cert. den. 333 U. S. 860. Except for some provisions not material here, Rule 47(b) of the Federal Rules of Civil Procedure is identical to Criminal Rule 24(c). The latter Rule em-

[4] When he learned of the mix-up, counsel for the appellant stated "I do not and cannot state now that had we been confronted with [Mrs.] Lottie Robinson we would have challenged her." (N. T. p. 984)

bodies the practice prescribed for civil cases by Civil Rule 47(b). See *Note of the Advisory Committee on Rules* to subdivision (c) to Criminal Rule 24. In *Larson v. General Motors Corporation*, 148 F. 2d 319, 322, cert. den. 326 U. S. 745, a case in which the construction of Civil Rule 47(b) was involved, the Court of Appeals for the Second Circuit could see no reason why the words "jurors who . . . be come unable or disqualified to perform their duty" should not be construed so as to cover "an ineligibility on the part of a juror that is first discovered after the trial has begun." Accordingly, there was no error in the trial court's denial of the motion for mistrial.

Another alleged error was the admission of certain summaries into evidence, prepared by Government agents and taken largely from the records produced by Rudy, Ferrari and Dombkiewicz. Since we here hold those records admissible, there can be no objection to the summaries prepared from them and, therefore, there was no error in their admission.

An additional alleged error, although not presented at argument, asserts that the court had no jurisdiction to try the appellant on counts eight and nine, as his returns were filed in Camden, New Jersey. However, these two counts of the indictment are different from counts four, five, six and seven, in that they charge appellant with "causing to be prepared" and "causing to be filed with the Director of Internal Revenue at Camden, New Jersey." However, the record discloses ample testimony on which the jury could and did find that the appellant caused them to be prepared at Philadelphia in the Eastern District of Pennsylvania.

Accordingly, the judgment of conviction and sentence will be affirmed.

APPENDIX B.

JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,148

UNITED STATES OF AMERICA

v.

MORRIS C. GOLDBERG, ALSO KNOWN AS MOE GOLDBERG AND M. C. GOLDBERG.
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and GANEY, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction and sentence of July 10, 1962, filed July 23, 1962, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF,
Clerk.

March 17, 1964

APPENDIX C.

ORDER OF COURT BELOW STAYING ISSUANCE OF MANDATE.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,148

UNITED STATES OF AMERICA

v.

MORRIS C. GOLDBERG, ALSO KNOWN AS MOE GOLDBERG AND M. C. GOLDBERG,
Appellant.

Pursuant to Rule 36(2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until April 16, 1964.

J. CULLEN GANEY,
Circuit Judge.

March 31, 1964

RECEIVED & FILED
Mar. 31, 1964
IDA D. CRESKOFF,
Clerk.